Supreme Court, U.S.
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No. 83-1021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

ALLSTATE INSURANCE COMPANY
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE

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SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE

Pursuant to Rule 16.6 of the Rules of this Court, the appellee, Allstate Insurance Company ("Allstate"), respectfully submits this supplemental memorandum to address the relationship between this appeal and the recent decision of the Fifth Circuit in *EEOC v. Hernando Bank, Inc.*, No. 82-4298 (5th Cir. Feb. 13, 1984),[1] and to correct certain misperceptions advanced by the appellant.

The appellant's Supplemental Memorandum incorrectly contends that the decision in *Hernando Bank* "will control the Commission's alternative appeal to the Fifth Circuit in the instant case" (Supp. Memo. at 3) and, accordingly, that

[1] Copies of the *Hernando Bank* opinion have been lodged with the Clerk of this Court by the appellant.

Hernando Bank obviates the need for this Court to exercise its 28 U.S.C. 1252 jurisdiction in this case. For the reasons stated below, both of these contentions are without merit.

First, this Court's jurisdiction under 28 U.S.C. 1252 is in no way abrogated by *Hernando Bank*. Section 1252 jurisdiction is properly invoked where, as here, a district court has held an Act of Congress unconstitutional. Motion to Affirm at 4-6. Whether a decision by the Court of Appeals would resolve the issue more promptly is wholly irrelevant. Once the appellant has properly invoked this Court's jurisdiction under Section 1252 that jurisdiction is mandatory, and the courts of appeals are affirmatively divested of jurisdiction. See 28 U.S.C. 1291.

Second, far from obviating the need for this Court to decide the constitutional issue presented by the instant appeal, *Hernando Bank* underscores Allstate's argument (Motion to Affirm at 5) that appellant EEOC continues to assert its authority to enforce the Equal Pay Act despite the lower court's constitutional holding. This Court provides the only means, therefore, of reviewing "the restraint on the federal government's administration of the law" imposed by the decision below. The definitive answer on the constitutional question here at issue must come from this Court, not the Fifth Circuit.

Finally, to the extent that the appellant relies upon *Hernando Bank*'s resolution of the underlying constitutional question, that case was wrongly decided.[2] The Fifth Circuit held that the one-house veto provision in the Reorganization Act was severable because "[w]ith the exception of Congressman

[2] Indeed, it appears from the record of *Hernando Bank* in the Fifth Circuit that the constitutional question of the EEOC's authority to enforce the Equal Pay Act was neither briefed nor argued before that court. In light of this record, it may be questioned whether, as the Solicitor General asserts, "[t]he decision in *Hernando Bank* adds the *considered judgment* of an appellate court" (Supp. Memo. at 3, emphasis added) as to the constitutional question presented in the instant case.

Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability." *EEOC* v. *Hernando Bank*, slip op. at 2057. In so holding, the Fifth Circuit overlooked a considerable body of legislative history which conclusively demonstrates that the legislative veto provision was intended to be an integral and essential element of the Reorganization Act. See Motion to Affirm at 7-8 and nn. 4, 5.

For the foregoing reasons, Allstate submits that this Court's jurisdiction over the instant case is unaffected by *Hernando Bank*, and that *Hernando Bank* is neither controlling nor persuasive authority on the constitutional question of whether the EEOC possesses lawful authority to enforce the Equal Pay Act.

Respectfully submitted,

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